MALAYSIAN REPORTS

ALLIANCE (MALAYA) ENGINEERING CO. SDN. BHD., S'PORE v. SAN DEVELOPMENT SDN. BHD.

[O.C.J. (B.T.H. Lee J.) March 29, 1972]

[Kuching — Civil Suit No. K. 240 of 1970]

Practice and Procedure — Summary judgment — Proper procedure for — R.S.C. 1957, O. 14 r. 1.

Practice and Procedure — Pleadings — Defence — Whether each paragraph of defence should be considered together or in isolation — R.S.C. 1957, O. 21 r. 1 and O. 25 r. 4.

This was an application under R.S.C. O. 14. The plaintiffs' action was commenced by a specially indorsed writ for the sum of $311,164 due and owing by the defendants. It was apparent that the deponents of the two affidavits filed in support of the application, did not testify from their own personal knowledge.

The issue for determination was whether, on the facts and in the circumstances of this case, the procedure adopted by the plaintiffs sufficiently complied with the requirements of O. 14 r. 1.

Held, dismissing the application: the procedure adopted by the plaintiffs fell short of the requirements of O. 14 r. 1.

Per curiam: It is only in plain and obvious cases that recourse should be had to summary procedure under O. 25 r. 4. To strike out a defence under O. 25 r. 4 and O. 19 r. 27, the paragraphs must be considered together and not in isolation. Furthermore, the court is entitled to look at the pleadings before it, together with the affidavits.

Cases referred to:-

(1) ***Papineau* v. *King* (1842) 10 W. & W. 216.**

(2) ***Sivagami Achi* v. *Chettiar* [1959] M.L.J. 221.**

(3) *Re Vernazza* [1959] 2 All E. R. 200.

(4) *Symon & Co.* v. *Palmer's Stores (1903) Ltd.* [1912] 1 K.B. 259.

(5) ***Shanghai Hall Ltd.* v. *Town House Hotel Ltd.* [1967] 1 M.L.J. 223.**

The following cases were cited in argument: *Anglo-Italian Bank* v. *Walles* (1878) 38 L.T. 197 at pp. 199, 200, 201; *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685 at p. 704; *Re Jacobs* v. *Booth's Distillery* 85 L.T. 262: 424; *Riches* v. *Westminister Bank Ltd.* [1943] 2 All E.R. 725; *Syn Lee & Co. Ltd.* v. *Bank of China* [1961] M.L.J. 87; *Cho Chin Huat* v. *Lee Boo Hock* [1970] 1 M.L.J. 112; *Cross* v. *Crowe* 62 L.J. Ch. 342; *Williamson* v. *London and N.W. Ry Co.* 12 Ch. D. 787 at p. 790.

APPLICATION.

Peter Mooney and *Chong Siew Fai* for the plaintiffs.

Patrick Tan for the defendants.

B.T.H. Lee J.: By their statement of claim dated 22nd December 1970 the plaintiffs claimed, *inter alia*. $311,164.00 being the amount of balance of monies due and owing to the plaintiffs by the defendants.

The defendants not having delivered any defence, judgment in default of defence was entered on 4th March, 1971, under R.S.C. O.27 r.2.

Shortly afterwards the defendants took out a summons and sought to set aside judgment in default of defence on 15th March, 1971 under O.27 r.2. Upon reading the affidavit in support of the application the court granted leave to the defendants to defend the action.

The defendants in due course by their defence, set off and counterclaim resisted the claim on the ground that they had both a *bona fide* and good claim to the action.

The plaintiffs delivered a reply to the defence, set off and counterclaim on 11th June, 1971.

On 13th August, 1971, the plaintiffs were minded to proceed under O.14 r.4 for an order that the plaintiffs be at liberty to enter judgment against the defendants for the sum of $226,164.00, as against $311,164.00 in the original claim.

For this purpose two affidavits in support of the application were filed by John Lo Sie Yin, the Assistant Director of Public Works Department, Sarawak, and Chong Siew Fai, advocate for the plaintiffs.

The application was adjourned into open court for argument on 4th October, 1971.

It is to be observed that at this stage, there was a change of advocates, due notice of the fact having been filed by counsel for the plaintiffs on 17th August 1971.

On 29th September, 1971, counsel for the plaintiffs took out another summons in chambers for an order that the defence be struck out under O.21 r.1 and O.25 r.4 on the ground that the defence disclosed no reasonable defence, and also that the defence is frivolous or vexatious and so forth and asked for judgment for $269,754.00 or $184,754.00 with interest.

This summons was struck out on 4th October, 1971, and costs thrown away for non-compliance with O.14 r.2.

On 11th October, 1971, counsel for the plaintiffs again took out a summons for an order to strike out the defence under O.21 r.1 and O.25 r.4 on the same grounds as the summons in chambers filed on 29th September, 1971.

I will deal first with the question of O.25 r.4.

It is only in plain and obvious cases that recourse should be had to this summary procedure (see *Papineau* v. *King*[1]). This, it seems to me, is not the case here.

As to striking out a defence under O.25 r.4 and O.19 r.27, the paragraphs must be considered together and not in isolation (see *Sivagami Achi* v. *Chettiar*[2]).

Furthermore, the court is entitled to look at the pleadings before it together with the affidavits (see *Re Vernazza*[3]).

Coming now to O.14 it is to be observed that the plaintiffs action was commenced by a writ which was specially indorsed with the plaintiffs' claim for the sum mentioned therein.

It seems to me if R.S.C. O.14 is to be applied to an action like this, the affidavits must be in proper form by the plaintiffs or by some other person who can swear positively to the facts and certifying the cause of action.

I do not find that from the affidavits of John Lo Sie Yin nor that of Chong Siew Fai.

John Lo Sie Yin, it appears has not sworn positively that he had personal knowledge of the payments made by the defendants to the plaintiffs, nor in regard to the agreements made between the parties.

Chong Siew Fai, advocate for the plaintiffs likewise cannot swear positively as to the facts since he is only acting on instructions of his client and his evidence is largely hearsay, as his affidavit shows.

It was decided in *Symon & Co.* v. *Palmer's Stores (1903), Limited*,[4] that where the affidavit is made by a person other than the plaintiff he must swear positively to all the matters necessary to constitute a *prima facie* cause of action.

Further down at page 263, it was held that:

"The remedy given by the Order is a most stringent one, namely, a judgment without a trial.....the framers of the Rules intended that the affidavit so required should be a condition precedent to the exercise of the power conferred by the Order to give judgment without a trial."

The judgment goes to say at page 264:

"...if there be not a compliance with the terms of Order XIV., r. 1, in respect of the affidavit to be made, there is no jurisdiction to give effect to that impression by making an order for judgment."

It is to be observed that omission to file an affidavit in reply is not fatal (see Federal Court decision in the case of *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.*[5]).

The question for decision is whether on the facts and in the circumstances of this case the mode of procedure adopted by the plaintiffs sufficiently complied with the requirements of O.14 r.1.

It is the court's opinion it has fallen short of the requirements of that Order.

A number of cases have been cited by counsel on both sides.

Upon the view which I have taken on the above, it becomes unnecessary for me to express an opinion as to the matters.

I therefore dismiss the application.

Application dismissed.

Solicitors: *Skrine & Co.*

NATHAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim F.J.) April 15, 1972]

[Penang — Criminal Appeal No. 25 of 1972]

Criminal Law and Procedure — Appeal — Accused desiring to expunge remarks from record — Locus standi — Inherent power of court to review — Criminal Procedure Code (S.S. Cap. 21) s. 322.

Criminal Law and Procedure — Grounds of decision — Not competent for court to supplement signed grounds of decision or make deletions therefrom — Unsatisfactory features of case — References of press reports in grounds of decision — Effect of.

Evidence — Testimony of accomplice — General principles.

Bribery and Corruption — Evidence of accomplice under Prevention of Corruption Act, 1961, s. 18.

The appellant/accused was charged under section 4(a) of the Prevention of Corruption Act, 1961, and was acquitted and discharged on January 10, 1972, without his defence being called at the close of the prosecution. The accused was dissatisfied with the order of the learned president because a remark was made to the effect that the acquittal was "on purely technical grounds", and with other observations made in the grounds of decision. He alleged, *inter alia*, a miscarriage of justice in that the learned president had delivered three sets of grounds of decision.

The purpose of this appeal was to expunge the offending remarks.

Held: (1) although the accused had no *"locus standi"* to "appeal" in connection with the judgment of the learned president, nevertheless, the court had inherent power, pursuant to section 322 of the Criminal Procedure Code, to review the decision;

(2) the only judgment for consideration by the court was the signed copy of the grounds of decision. It is not competent for the court to supplement the signed grounds of decision;

(3) there should be a retrial of the accused before another sessions court president.

Cases referred to:-

(1) *Sheo Swarup & Ors. v. King Emperor* 51 T.L.R. 10 at p. 11; L.R. 61 I.A. 398; A.I.R. 1934 P.C. 227.

(2) *Grondkowski & Anor.* (1946) 31 Cr. App. R. 116 at p. 120.

(3) *Loh Kwang Seang* v. *Public Prosecutor* [1960] M.L.J. 271.

(4) *Putra v. Sivagnanam & Anor.* [1959] M.L.J. 259 at p. 260.

(5) *Public Prosecutor* v. *Haji Ismail & Anor.* [1940] M.L.J. 76.

(6) *Soosay Dass* v. *Public Prosecutor* [1951] M.L.J. 57 at p. 58.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Mohamed Yosuf bin Mohamed Nor (Deputy Public Prosecutor) for the Public Prosecutor.

Ong Hock Sim F.J.: The accused, Mr. T. N. Nathan, was charged in the sessions court, Georgetown on a charge under section 4(a) of the Prevention of Corruption Act (No. 42) of 1961) and, after a somewhat lengthy trial, was acquitted and discharged on 10th January 1972 without his defence being called at the close of the prosecution.

Despite his acquittal, the accused was dissatisfied with the judgment or order of the learned president because of his remark to the effect that the acquittal was "on purely technical grounds" and with other ob-